

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

Application of: Dave B. Lundahl

Examiner: Tran A, Phi Dieu N

Serial No.: 09/326,405

Group Art Unit: 3637

Filed: June 4, 1999

Docket: INOV.01US01

Title: IMPROVED WINDOW SCREEN SYSTEM

Mail Stop Appeal Brief - Patents
Assistant Commissioner for Patents
P. O. Box 1450
Alexandria, VA 22313-1450

REQUEST FOR REHEARING

Honorable Board of Appeals:

In response Appeal No. 2006-1417 decided October 27, 2006, wherein the Board of Appeals affirmed the Examiner's rejection of the appealed claims, appellant requests rehearing of the Decision on Appeal.

Appellant respectfully believes that the following matters have been misapprehended or overlooked in the Board's decision:

**1. THE EXAMINER HAS FAILED TO UNDERSTAND THE TEACHINGS
OF THE KEHNE REFERENCE.**

The Board has overlooked this argument in its Decision.

In Section 10, paragraph 2 of the Supplemental Examiner's Answer, the Examiner concluded that: "... it would have been obvious to one having ordinary skill in the art at the time of the invention to modify Kehne to show the screen

being attached to the frame by hook and loop fastener because it would enable easy fitting of the screen frame around a window frame as taught by Lazarek."

On page 3 of appellant's Supplemental Reply Brief filed on November 14, 2005, appellant stated: "In Col. 1, lines 41-45 of Kehne, the window is defined as a composite casement including a fixed frame with hinged sash, wherein the frame may be completely assembled for shipment as a composite unit for installation. In Col. 2, lines 43-44, Kehne further defines the window as the fixed frame **11** in Figs. 1 and 2. In Col. 3, lines 26-40, Kehne defines the screen as fitting inside of frame **11** and seated against the outer edges of other independently applied wall construction elements that Kehne identifies as jambs **25**. Kehne further confirms that the jamb elements are independent from the window frame of Kehne in Col. 3, lines 52-56. Figures 1 and 2 clearly show that jambs **25** are building construct elements which surround Kehne's window, but are not part of the window itself; jambs **25** are illustrated with the same hatch markings as other wall sheathing **7** and wall covering **8**, instead of the hatch markings utilized to identify window components, **11** and **16**. Moreover, the components of fixed frame, **11**, are defined in Col. 2, lines 42-51, of Kehne, and do not include jambs **25**. Thus, the Examiner is incorrect in stating that '... the screen being attached to the frame by hook and loop fastener' Since Lazarek requires that the demountable screen be mounted around what would be considered to be the frame of the sliding car window, while Kehne does not mount the screen frame to the window frame, applicant believes that the two references teach away from one another; that is, Kehne mounts the screen disclosed therein to structures other than the window frame. Applicant therefore believes that the Examiner has improperly combined the Kehne and Lazarek references, and thereby failed to make a proper *prima facie* showing of obviousness."

Appellant therefore respectfully believes that the Examiner has not fully understood the teachings of the Kehne reference, and has improperly combined Lazarek with Kehne.

2. WHAT MOTIVATION WOULD THERE BE FOR SOMEONE SKILLED IN THE ART TO PLACE A SCREEN WHICH CAN READILY BE INSTALLED AND REMOVED FROM THE INSIDE OF A WINDOW FRAME IN A LOCATION IN WHICH IT CANNOT READILY BE INSTALLED OR REMOVED?

The Board has misapprehended this matter in its Decision.

On page 4 of the Decision, the Board stated that: "Appellant contends that the references are not combinable because Kehne mounts the screen on the exterior portion of the window whereas Lazarek mounts the screen to the interior portion of the window. However, it is well settled that it is not necessary for a finding of obviousness under § 103 that all the features of one reference be incorporated with the features of another reference. *In re Griver*, 354 F.2d 377, 381, 148 USPQ 197, 200 (CCPA 1966); *In re Billingsley*, 279 F.2d 689, 691, 126 USPQ 370, 372 (CCPA 1960). The relevant question is what would the collective teachings of the references have suggested to one of ordinary skill in the art. *In re Keller*, 642 F.2d 413, 425, 208 USPQ 871, 881 (CCPA 1981). In the present case, we are satisfied that the collective teachings of Kehne and Lazarek would have suggested the use of hook and loop fasteners for removably connecting the screen of Kehne to the fixed frame. While Appellant maintains that Kehne teaches a permanently mounted screen, we agree with the Examiner that Kehne's disclosure of supporting a screen 'in a more or less permanent manner' would have suggested a screen that is ultimately removable (see col. 1, ll. 60-62). Furthermore, we agree with the Examiner that it was notoriously well known in the art to provide removable screens in the fixed frame of a window. Applicant also maintains that Lazarek 'clearly does not suggest any method for 'mounting the screen in a permanent manner' as set forth in Appellant's claims (principal Br. 7, second paragraph). This argument is not germane to the claimed subject matter since the quoted recitation is not found in the appealed claims. Indeed, rather than calling for mounting the screen in a permanent manner, the claims recite a removable screen."

Assuming for argument that the screen of Kehne is mounted to the exterior of the frame of the window (That is, ignoring for purposes of discussion that the screen of Kehne is not mounted on the window frame thereof.), appellant believes that Kehne intended that the screen be removable for servicing, but otherwise affixed to the frame. There is no discussion of the manner in which the screen is held in place in Kehne, but screens installed on the exterior of casement window frames are not readily removed or installed from the inside. According to the American Heritage Dictionary of The English Language, 3rd Ed. (Houghton Mifflin Company, Boston, New York 1992), the principal definition for "more or less" is "about" or "approximately." Therefore, applicant respectfully believes that the screen of Kehne is intended to remain in place.

In Col. 1, lines 20-27, of Lazarek it is stated that: "Permanently attached screens to the automobile windows are undesirable in that they impair visibility and are probably not necessary in view of the fact that insect annoyance is a serious problem only when the automobile is parked, because when the vehicle is moving the rush of air past the vehicle is sufficient to prevent insects from entering a moving automobile." Lazarek continues in Col. 2, lines 20-27, that: "Accordingly, it is an object of this invention to provide a screen for a car window that may be demountably installed without the use of tools, without defacing the window frame, which is neat and inconspicuous in appearance, which may be stored in a minimum of space when not in use, and which does not interfere with the normal operation of the automobile window." Thus, Lazarek teaches the infrequent use of nonpermanent screens which can be stored in a minimum of space, but which can be readily installed and removed.

As stated hereinabove, exterior-mounted framed screens may be removed from casement windows from the inside of a house with some difficulty depending on how they are mounted. However, how can one easily attach male and female portions of Velcro tape located exterior to a window frame from the inside? Therefore, appellant believes that it clearly matters that the screen of Lazarek is

installed on the inside of a window frame if it is going to be frequently installed and removed. Further, appellant questions what motivation would there be for someone skilled in the art to replace a framed screen which can be installed and removed from the inside of the house with some difficulty, with an unframed screen that is designed to be easily removed from the inside when mounted on the inside of a window frame, but would be more difficult to remove and install when mounted on the exterior of a window frame? Clearly, the combination of Lazarek with Kehne, as suggested by the Examiner, is an attempt to reconstruct appellant's invention using impermissible hindsight.

3. HOW CAN ONE ATTACH A SCREEN TO THE WINDOW OF KEHNE WHICH IS LARGER THAN THE OPENING IN THE WINDOW FRAME?

The Board has overlooked this argument in its Decision.

On pages 2 and 3 of appellant's Supplemental Reply Brief filed on November 14, 2005, appellant stated: "Turning now to the first line of the Abstract, Col. 1, lines 44-45, Col. 3, lines 24-27, and claim 1, lines 3-4, of Lazarek clearly emphasize that the sheet of screening is to be somewhat larger than the window. Moreover, Col 3, lines 9-11, calls for canvas belting extending beyond the periphery of the screen to form a tab. This permits the screen of Lazarek to be mounted over the car window (Col. 1, lines 60-61). Kehne, in Col. 3, lines 34-40, requires that the outer edges of the jambs be spaced inwardly from the inner face of the sash frame in order to provide a seat for the frame of a window screen. From Figs. 1 and 2 it may be observed that the window screen frame is disposed inside of the perimeter of the fixed frame (the components of fixed frame, **11**, are defined in Col. 2, lines 42-51) of Kehne. Kehne further requires in Figs. 1 and 2 and in Col. 3, lines 11-15, that weather stripping secured to the inner surface of the sash frame is adapted to seat in the bottoms of the grooves in the outer surface of the fixed frame. If one were to combine the teachings of Lazarek, which stress an oversized screen (one larger than the perimeter of the window panel and, as a

result, larger than the perimeter of the window frame of Lazarek), with Kehne which, by contrast, requires a screen frame and consequently a screen that is smaller than the perimeter of the fixed frame, the weather stripping secured to the inner surface of the sash frame of Kehne could not properly seat in the bottoms of the grooves provided therefor in the stationary frame. Thus, the combination of Lazarek with Kehne, as the Examiner has suggested, renders the invention of Kehne inoperative. As stated in previous papers, Kehne and Lazarek disclose the use of screens in different locations with respect to the window, and for different window designs. There is little to restrict the oversize dimensions of the screen disclosed by Lazarek, since the operation of the window is unaffected thereby. By contrast, screen dimensions are important for Kehne, since the proper operation of the sash frame would be impaired by a screen constructed in accordance with Lazarek."

Thus, appellant believes that the Board has overlooked another of the reasons one having ordinary skill would not be motivated to combine the teachings of Lazarek with those of Kehne to render obvious the present claimed invention.

Moreover, Section 2145 of the Manual of Patent Examining Procedure states that: "It is improper to combine references where the references teach away from their combination." Since Lazarek teaches away from Kehne, appellant believes that the Examiner has improperly combined these references, and thereby failed to make a proper *prima facie* showing of obviousness.

4. THE HELZER DECLARATION IS MORE SPECIFIC THAN THE EXAMINER HAS INDICATED.

The Board has overlooked this issue in its Decision.

On pages 5 and 6 of the Decision, the Board stated that: "Appellant relies on Helzer and Thompson Declarations under 37 C.F.R. § 1.132 as evidence of commercial success. However, we find that the Examiner has lodged valid

criticisms regarding the weight of the Declaration evidence. For instance, the Declaration of Helzer, the Vice President for Marketing and Sales for the present assignee, states in paragraph 15, that Five Point Windows, the exclusive licensee of a window system in accordance with the appealed claims, 'has sold over \$6,300,000 in 15 major orders of window systems that include the Frameless Velcro Screen System (emphasis added). As pointed out by the Examiner, there is no indication what proportion of the reported figure represents the sale of window systems in accordance with the appealed claims. Similarly, paragraph 18 of the Declaration reports a contract in excess of \$720,000 for unspecified windows and doors, while paragraph 21 of the Declaration refers to a contract in excess of \$580,000 for "casement type windows" that is 'due in part to the aesthetic value of the Frameless Velcro Screen System' (emphasis added). Also, while paragraph 22 of the Declaration states that the \$580,000 contract was specifically entered 'because the screen was mounted between the fixed frame and the moving sash, for a casement window,' the Examiner correctly points out that the window system of Kehne has the screen mounted between the fixed frame and the moving sash."

However, appellant respectfully points out, it was not the casement windows of Kehne that were selected; rather, the claimed Frameless Velcro Screen System of the present claimed invention was selected. Further, Paragraph 23 of the Helzer Declaration states: "That the architect specifically did not want a conventional screen frame that is typically mounted on the exterior frame of an in-swing casement window;". This is a direct affirmation of the already stated reasons that the present claimed invention was the cause of the commercial success of the Point Five Windows. Additionally, Paragraph 19 of the Helzer Declaration states that: "That the \$720,000.00 contract was awarded in large part specifically because the Frameless Velcro Screen System eliminated the conventional aluminum screen frame that would have been susceptible to deterioration in the harsh salt air environment of the Bahamas;" Appellant believes that this latter statement is dispositive on the issue that the Frameless

Velcro Screen System was specifically chosen to avoid attack on the frame as a result of proximity of the windows to the ocean, because of the "in large part" language thereof.

Additionally, In the Declaration Under 37 CFR 1.132 by Michael Thompson, it is clearly stated that the subject thereof is a casement window having a removable screen connected to the fixed frame with a hook and loop fastener system. This feature is not disclosed by the Kehne patent, and it was the recommendation of Mr. Thompson to Lipkin Warner Design and Planning, LLC which led to the purchase of a significant number of Point Five Windows having the Frameless Velcro Screen System. This recommendation was clearly based on the aesthetic and functional differences of the Point Five Windows having the Frameless Velcro Screen System over any known windows.

5. THE THOMPSON DECLARATION IS MORE SPECIFIC THAN THE EXAMINER HAS INDICATED.

The Board has overlooked this issue in its Decision.

On pages 6 and 7 of the Decision, the Board stated that: "The Declaration of Michael Thompson, an architect who supported a contract in excess of \$580,000 to the present assignee, is similarly flawed. Paragraph 2 of the Declaration vaguely refers to the contract 'for numerous windows for a residence project.' Furthermore, in paragraph 7, the Declarant states that the contract was awarded 'due in part' to the window system of the present invention. Manifestly, the Thompson Declaration, as well as the Helzer Declaration, falls short of convincingly demonstrating the requisite nexus between the asserted commercial success and window systems within the scope of the appealed claims. *Ex Parte Remark*, 15 USPQ2d 1498, 1502 (Bd. Pat. App. & Inf. 1990). Furthermore, we agree with the Examiner that the Declaration evidence fails to establish that any commercial success was due to the merits of the claimed

invention rather than other activities on the part of the present assignee, e.g., advertising, sales campaigns, and associations with established customers."

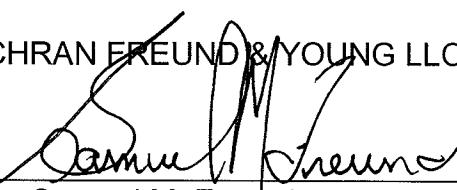
Appellant wishes to point out that Paragraphs 8 and 9 of the Thompson Declaration state: "That I specifically did not want a conventional screen having a frame that is typically mounted on a casement window for the above mentioned project;" and "That Lipkin Warner Design and Planning, LLC supported the \$580,000.00 contract award to Point Five Windows based in part on the fact that the Frameless Velcro Screen System offered aesthetic and functional differences over any other known solution, which included conventional screen frames;". Thus, appellant believes that the very words of the architect identifies the reason for the choice of the Frameless Velcro Screen System of the present claimed invention; namely, the architect did not want a conventional screen having a frame.

Appellant therefore requests rehearing of the Decision on Appeal.

Dated this 27th day of December 2006.

Respectfully submitted,

COCHRAN FREUND & YOUNG LLC

By: 

Samuel M. Freund

Reg. No. 30,459

Attorney for Appellant

2026 Caribou Drive, Suite 201

Fort Collins, CO 80525

Telephone: (970) 492-1100

Facsimile: (970) 492-1101